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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-766

YODER BROTHERS, INC.,
Petitioner,

vs.

CALIFORNIA-FLORIDA PLANT CORPORATION AND
CALIFORNIA-FLORIDA PLANT CORPORATION
OF FLORIDA,
Respondents.

BRIEF OF RESPONDENTS CALIFORNIA-FLORIDA PLANT CORPORATION AND CALIFORNIA-FLORIDA PLANT CORPORATION OF FLORIDA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents respectfully suggest that a Writ of Certiorari in the instant case is neither necessary nor appropriate for the reasons stated below.

QUESTIONS PRESENTED

The initial question is whether the respondents, who directly paid substantial sums of money to peti-

tioner Yoder as a result of the coercion of Yoder's illegal boycott, are precluded as a matter of law from recovering these sums by the "passing-on" defense.

The corollary question is whether the holding of the Court of Appeals is in accord with the decision of this Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 981 (1968).

STATEMENT OF THE CASE

In the words of Chief Justice John R. Brown, dissenting in part and concurring in part:

> "This was big business—the business of the breeding, developing, propagating and ever expanding distribution and sales of chrysanthemums or cuttings which produce chrysanthemums for a life cycle of production, distribution and sales of chrysanthemums." (App. 117a)[1]
>
> * * *
>
> "And here David and Goliath are struggling over a single thing—chrysanthemums. Survial of one in this business depends on whether the other can be curbed." (App. 124a)

The foregoing references are to petitioner Yoder Brothers, Inc. ("Yoder") and respondents CFPC and CFPCF (collectively called "Cal-Florida"). Yoder and Cal-Florida are competitors in the sale of chrysanthemum cuttings to growers of chrysanthemums. The litigation was commenced by Yoder who filed an ac-

[1]The Appendix to the Petition for a Writ of Certiorari is cited (App. ——). The Deferred Appendix before the Court of Appeals is cited solely by page numbers. Exhibits are cited (E. ——).

tion against Cal-Florida for infringing plant patents and failing to pay a royalty to Yoder. Cal-Florida counterclaimed, alleging that Yoder's efforts to collect royalties through the coercion of its various plant protection devices constituted illegal restraints of trade and monopolization.

Yoder's first effort to maintain its dominance of the market for chrysanthemum cuttings was in 1958. Prior to that time there was no serious competition from other commercial propagators or breeders of chrysanthemums. (511a-512a)

In 1958 Yoder adopted a policy of not selling chrysanthemum cuttings to any grower who did not sign a Yoder Growing Agreement ("YGA"). The YGA agreement prohibited any purchaser of Yoder cuttings from selling, loaning or otherwise disposing of purchased cuttings or mutations appearing as a result of propagating those cuttings to third parties for purposes of reproduction. (E. 528) The YGA agreement also provided that all mutations, bud variations or sports, although found on plants purchased and grown by the buyer, remained the "exclusive property" of Yoder. (E. 528) Yoder enforced its absolute control over those varieties, the most advertised and most popular on the market, by refusing to ship them to anyone who did not sign their restrictive agreement. (E. 527; 594a-596a) Yoder informed Cal-Florida that under no circumstances would they be allowed access to Yoder's varieties. So, in an effort to remain in business, Cal-Florida obtained YGA varieties from growers who had signed the YGA agree-

ment and were unhappy with its restrictive terms. (750a-753a; 755a-756a)

When it became apparent that Yoder could not control competitors such as Cal-Florida by the use of YGA agreements, YGA's status changed, as one Yoder officer testified, from "stage one" to a larger scheme also designed to retain control of the industry in Yoder's hands. (616a-619a; 611a-612a) Stage two of that scheme was the BGA series of contracts.

The BGA program involved three basic contracts; one to control commercial propagators such as Cal-Florida (E. 539; E. 552; E. 1147), another to license growers who propagated their own cuttings (E. 541), and another to control growers (those who simply bought cuttings and grew them) by forbidding any propagation of BGA varieties.[2] (E. 542). Both the grower license and the commercial propagator license required the payment of a royalty to Yoder for each cutting taken from a Yoder variety.

Of course, there was much vocal industry opposition to the formation of BGA International, Inc., opposition that was acknowledged by Mr. Miller of Yoder in his testimony as "disagreements" or "criti-

[2]In 1968, in addition to the BGA, Yoder established a scheme entitled Grower Rights Agreement ("GRA"). (E. 595) This program was an effort to retain control of mutations emanating from chrysanthemum varieties which had not first been sold in accordance with the terms of the BGA contracts. (E. 615) No prepagator-distributors, other than Yoder Brothers, were allowed to give GRA cuttings. (662a-668a) Indeed, the GRA agreement that the grower had to sign was enforced, as the BGA and YGA agreements had been, and it forbade the signatory from selling, loaning, giving or otherwise disposing of GRA varieties either purchased or propagated for the purpose of reproduction. (E. 595)

cism." (647a-648a) But that opposition did not stop Yoder from proceeding under the BGA scheme as it had under the YGA scheme. If a grower refused to sign a BGA agreement, he simply would not be shipped the varieties he needed to stay in business. (E. 597; E. 598; E. 600; E. 638; E. 639; E. 640; E. 641; E. 642; E. 643; E. 644; E. 645) Those who received BGA varieties, including Cal-Florida, were carefully policed to ensure that they were not selling to anyone who had not signed a BGA contract. (E. 660) Yoder's BGA administrator, Warren Domer, testified that no effort was spared by Yoder to ensure that BGA varieties were only shipped to signatories. (843a) Yoder then carefully "followed up" on their brokers' sales to ensure that the BGA agreements were being strictly observed. (E. 660; 866a)

Vigorous enforcement of the BGA contract scheme through refusing to ship to non-signatories eventually brought everyone into line, including Cal-Florida.

Bowing to the illegal threat of boycott, Cal-Florida was forced to pay a royalty for each cutting of a BGA or GRA variety sold.

The effect of this course of conduct by Yoder on the industry and on Cal-Florida was dramatic. In large part because of the fact that mutations were, under BGA and GRA, returned to Yoder as the breeder of the seedling, Yoder retained control of new varieties. Over the years more and more of Cal-Florida's sales were of varieties controlled by Yoder and BGA. In 1963, only .19% of Cal-Florida's cutting sales were BGA or GRA. By 1969, the number

had grown to 17.59%, and by 1971 to 41.22%. (E. 938) In 1968 Yoder received $244,197 in royalties for one year. (E. 696) No longer able to support a Yoder breeding program and a CFPC breeding program at the same time, and needing BGA varieties to survive, Cal-Florida was forced to terminate its own efforts to develop new varieties. (1550a-1551a) By 1971 Cal-Florida was paying over $100,000 per year in royalties, a sum which, if it were not for the coercion of BGA, could have been devoted to its own breeding program. As a result, the chrysanthemum industry was denied the benefit of another source of new varieties and Yoder's dominance of the chrysanthemum cutting industry was assured.

The BGA boycott continued unabated until the Anti-trust Division of the Department of Justice stepped onto the scene in 1970, and filed an antitrust complaint to stop the system. (E. 1025) A consent decree was entered into between the Department of Justice and Yoder providing that BGA and GRA contracts were stripped of all provisions providing for royalty payments, controlling resale of cuttings, or owning sports from cuttings propagated by others. (E. 1055) Therefore, a new tack had to be found and Yoder decided to try to retain control through the use of patents. As one Yoder official testified, after November of 1971, all new Yoder seedlings were "automatically" patented. (917a-918a) That practice continued to the time of trial. (1092a) When the Government stopped BGA, Yoder merely switched to a public patent system. As practiced by Yoder the patent system was nothing more than another BGA pro-

gram. No invention or contribution to the art was needed; registration with the Patent Office, instead of BGA, was all that Yoder considered necessary.

Cal-Florida alleged that these facts proved an illegal scheme to control an industry, which was begun over sixteen years ago and which continued right up to the time of trial of this action.

As this case proceeded to trial, the District Court held that the BGA and GRA programs were *per se* violations of Section 1 of the Sherman Act under *Fashion Originators Guild of America v. Federal Trade Commission,* 312 U.S. 457 (1941) and directed a verdict accordingly. However, with regard to the patent phase of this program, the District Court held that Yoder did not possess sufficient market share to violate Section 2 of the Sherman Act and directed a verdict against Cal-Florida.

On appeal the Fifth Circuit Court of Appeals unanimously affirmed the District Court's directed verdict with regard to the Section 1 boycott and with one judge dissenting affirmed the District Court's directed verdict with regard to the Section 2 monopolization and attempted monopolization.

Cal-Florida's claims for damages included the amount of royalties which Cal-Florida was coerced into paying under the BGA and GRA programs.[3]

Yoder defended against the claimed damages by raising a defense of "passing-on." The District Court submitted this defense to the Jury and the Jury re-

[3]No royalties were paid under Yoder's patent program.

turned a verdict for Cal-Florida. On appeal, the Fifth Circuit Court of Appeals held that it was error for the District Court to submit the "passing-on" defense to the Jury and that as a matter of law, based on the record in this case, Yoder had not made a convincing showing of the four necessary elements of the "passing-on" defense as established by this Court's opinion in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

REASONS FOR DENYING THE WRIT

The decision of the court below, in holding that Yoder had failed to prove facts which would entitle it to raise the defense of "passing-on" by virtue of a preexisting cost plus contract or its equivalent, is in accord with the decision of this Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

ARGUMENT

1. THE DECISION OF THE COURT BELOW IS IN ACCORD WITH THIS COURT'S RULING IN HANOVER SHOE

This Court has repeatedly emphasized the importance of the Congressional policy that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). In accordance with this policy this Court has cautioned the lower courts that they "should not add requirements to bur-

den the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws." *Radovich v. National Football League,* 352 U.S. 445, 454, (1957). In expressing this policy this Court has on numerous occasions rejected or severely limited the efforts of antitrust defendants to escape liability on the basis of implied defenses to the statute. *E.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968) (refusal to recognize *in pari delicto* as a bar to an antitrust suit); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1954) (refusal to apply doctrine of res judicata to bar subsequent suit); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 (1971) (refusal to apply statute of limitations to preclude recovery of later ascertained damage).

One of the most important expressions of the policy is this Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) rejecting the defensive use of "passing-on" by a defendant stating:

> ". . . [It] is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.
>
> "In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the

buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness."

392 U.S. at 493-94

In *Hanover Shoe* the plaintiff, Hanover Shoe, sued a manufacturer, distributor and lessor of shoe machinery. The lower courts had ruled that the measure of plaintiff's damages was the difference between the amount plaintiff actually paid to defendant for the shoe machinery and the amount it would have paid absent the defendant's unlawful conduct. The lower courts had further held that the "passing-on" defense was not available to the defendant and that the damage figure would not be reduced by reason of any evidence tending to show "passing-on."

This Court upheld the lower court's rejection of the "passing-on" defense and made it quite clear that it was announcing a general rule of law to the effect that the "passing-on" defense was unavailable to the defendant in an antitrust case where the plaintiff seeks to recover illegal overcharge payment on direct purchases. The first basic reason for such a rule, this Court noted, is that steps taken by an overcharged buyer to maintain his profit level during the overcharged period—whether by "passing-on" the overcharge in the form of increased resale prices, by increasing his volume of sales or by decreasing his other costs—do not alter the fact that an illegal overcharge existed, and that the buyer's profits would have been even greater but for the overcharge. In the Court's own words:

"We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury damage within the meaning of Section 4 [of the Clayton Act].

"If in the face of overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower."

392 U.S. at 489

The second basic reason underlying this Court's refusal to recognize the "passing-on" defense is that, as a practical matter, attempts to establish the defense would in most cases involve courts and litigants in impossible and interminable difficulties of proof:

> "Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated theories."
>
> 392 U.S. at 493

This is a critical passage in the *Hanover* opinion. It is here that this Court sets forth *five definite elements of the passing-on defense,* each of which must be *"convincingly"* established in any case before the defense may properly be raised. The five elements are:

1. That the plaintiff purchaser raised his price in response to the overcharge;

2. That the plaintiff purchaser raised his price in the amount of the overcharge;

3. That the plaintiff's margin of profit did not thereafter decline;

4. That the plaintiff's total sales did not thereafter decline; and

5. That the plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued.

As mentioned, the manifest difficulty of proving these five elements of the "passing-on" defense was a paramount factor in the Court's general rejection of this defense. In adopting the general rule the Court noted one situation where all five elements might be present—a preexisting cost-plus contract or its equivalent.

The "preexisting cost plus contract" situation is the *one situation* where the five elements of the "passing-on" defense would be "easy to prove," and where "the considerations requiring that the passing-on defense not be permitted . . . would not be present." 392 U.S. 494. If a plaintiff purchaser has preexisting contracts with his customers for resale of goods at the plaintiff's cost plus a certain percentage then there can be no question that (1) the plaintiff will raise his price in response to the overcharge, (2) the plaintiff will raise his price to the amount of any overcharge, (3) his margin of profit will not thereafter decline, (4) his total sales will not thereafter decline, and (5) the plaintiff could not or would not have raised his prices absent the overcharges or maintained the higher price had the overcharge been discontinued. But while these five elements of the "passing-on" defense can easily

be proved in the "preexisting cost-plus contract" situation, it is difficult to conceive of other situations where each of such elements could be easily proved.

In this case Yoder is *not entitled* to assert the "passing-on" defense unless it can prove that Cal-Florida's situation was such as to bring them within the *Hanover* exception of a "preexisting cost-plus contract, or the equivalent."

Initially, it may be noted that the record contains no evidence whatsoever that Cal-Florida ever sold cuttings to any customers under a "preexisting cost-plus contract, or the equivalent."

Therefore, in evaluating Yoder's "passing-on" evidence, it is necessary to determine whether this evidence establishes the *five elements* of a valid "passing-on" defense outlined in *Hanover*.

The primary evidence which Yoder offered in support of its "passing-on" defense was that Cal-Florida separately stated on their invoices and on their price lists the fact that the purchase price included the royalty charge. While practice may make it possible to segregate the royalty payments from other cost items in the production and sale of cuttings, Yoder has completely failed to:

a. Make a "convincing showing" that Cal-Florida's margin of profit did not thereafter decline;

b. Make a "convincing showing" that Cal-Florida's total sales did not thereafter decline; and

c. Make a "convincing showing" that Cal-Florida could not or would not have raised

their prices absent the royalty payments or maintained the higher price had the royalty been discontinued.

In fact, the evidence indicates the contrary. By dividing the operating profit or loss of Cal-Florida by the total cuttings sold for the years 1964 to 1968, it is apparent that Cal-Florida's margin of profit was decreasing. (E. 938; E. 274-E. 278)

Year	*Margin of Profit Per 1000 Cuttings*[4] *(rounded to nearest cent)*
1964	$2.52
1965	2.13
1966	2.38
1967	1.50
1968	(1.85) loss

It was only after a substantial reorganization (including the termination of much of Cal-Florida's research) that Cal-Florida in 1969 was again able to turn a profit and thereafter increase its profit margin. (1550a-1551a) and from 1969 to 1971 there was a decline in the number of cuttings sold. (E. 938)

To refute the proposition that Cal-Florida would not have raised its prices absent the royalty payments or maintained a higher price if the royalty payments had been discontinued, one need only to refer to DX 2234 and to the testimony of Ramsey Yoder regarding his pricing action after the termination of BGA. This evidence shows—without conflict—

[4]These figures were derived by dividing the net profit by the number of cuttings sold.

that after the cessation of BGA royalties not only Cal-Florida but also Yoder raised their prices. Of Yoder's price increase of May, 1972, Mr. Ramsey Yoder testified:

> "Q. Well, can you tell me why between April, 1971 and May, 1972, you raised the price of Aglow 60 cents and dropped the 60 cent royalty charge:
>
> A. The price stayed the same.
>
> Q. Well, the royalty was merged into the price, was it not?
>
> A. Well, I don't know. The price remained the same though. If you take the $8.60 and the 60 cents, it is $9.20, and the price on May, '72 for Aglow is $9.20.
>
> Q. Let me see if I can understand it. In April of 1971, the price was $8.60 per hundred cuttings, and then in May of '72 you raised it to $9.20 a hundred cuttings. Can you tell me why you made that change?
>
> A. As far as I am concerned, the price April 5, 1971 is $9.20.
>
> Q. Because of the BGA royalty?
>
> A. That is correct." (1138a-1139a)

From this testimony it is apparent that Yoder itself, while following the practice of indicating the amount of the BGA royalty, was able to increase its selling price after the termination of the illegal BGA system by an amount exactly equal to the BGA royalty

Furthermore, unlike the "pre-existing cost-plus" situation, Cal-Florida paid BGA royalties at the end of each month (1876a), regardless of whether the cutting was used or sold and regardless of whether

Cal-Florida was later paid for cuttings sold. (1363a) Moreover, two commercial propagators, in addition to Cal-Florida, testified that they were unable to pass on BGA royalties. (1499a; 1507a-1508a; 1522a)

The Fifth Circuit Court of Appeals noted, from the record, that Yoder did not show that the higher illegal price did not affect the total sales. As the Court said:

> ". . . we have no way of knowing whether sales to growers would have increased even more if the cutting had been available at a lower price. Simple economics suggest that sales would have increased at lower prices. The evidence indicated that growers looked to the total cost of a cutting in deciding what to buy; when that cost became prohibitively high some growers turned to self-propagation." (App. p. 87)

The Court of Appeals also noted, from the record, that Yoder did not show that the higher illegal price did not affect Cal-Florida's cost.

> "The difficulty of estimating the cost per unit for a different volume of sales suffers from the same infirmity since the difference in total sales is an uncertain figure, the breakdown of that figure into cost per unit plus profit is equally uncertain." (App. 87a)

Yoder has raised the old spectre of double recovery to support its plea for a Writ of Certiorari. However, this problem was never in this case and Yoder has now gone outside the record to suggest that this might have been a problem. If this issue had been raised in this case it could have been solved in the

manner shown by the Ninth Circuit Court of Appeals in *State of Alaska v. Standard Oil of California,* 487 F.2d 191 (9th Cir. 1973), *cert. denied* 415 U.S. 919 (1974).

> "It is urged that our decision for appellants would result in requiring appellees to twice pay treble damages. As we have said, the amount of overcharge is not subject to double payment, because appellees' liability in that regard is to be apportioned after the amount of the overcharge is fixed. Further, each plaintiff (including appellants), be he intermediary or ultimate consumer, will be awarded only such further damages, including lost profits, as he may reasonably prove allocable to him.
>
> [*Double Recovery*]
>
> "We therefore see no problem of double recovery, and we believe that if this difficulty should arise in some other connection, the district court will be able to fashion relief accordingly. In addition to the court's control over its decree, numerous devices exist. We note that the consolidation of cases, which has already occurred, is one means of averting duplicitous awards. The short, four-year statute of limitations is another; later suits, after final judgment herein, are unlikely. 15 U.S.C. §15b. In other cases, it may be that statutory interpleader, 28 U.S.C. §1335, could be used by antitrust defendants to avoid double liability. If necessary, special masters may be appointed to handle complex cases. Finally there are the doctrines of res judicata and collateral estoppel and procedures for compulsory joinder. The day is long past when courts, particularly federal courts, will deny relief to a

> deserving plaintiff merely because of procedural difficulties or problems of apportioning damages. See *Boshes, supra,* at 94, 147-48.
>
> "We would prefer to place the burden of proving apportionment upon appellees, rather than deny all recovery to appellants. Such a burden would be the consequence of appellees' illegal acts, not appellants' suits. Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed. *Hanover Shoe, supra,* 392 U.S. at 494. So, too, between ultimate purchasers and defendants."

If this Court were to review this double recovery approach, it might be better to wait for a case in which this is a real issue properly raised and decided in the lower courts.

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2. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND OTHER CIRCUITS

Yoder has argued that the decision below squarely conflicts with other post-*Hanover Shoe* cases. This is not so. The only Circuit Court case cited by Yoder is *Obron v. Union Camp Corp.,* 477 F.2d 542 (6th Cir. 1973), a per curiam decision involving a totally dissimilar situation which

> "The District Court correctly characterized . . . as comparable to a sales commission and observed that '[*T*]*he only reasonable inference is that the plaintiff himself profited by any increase in prices set by defendant Union.*'" Id. at 543.

The other two cases cited by Yoder are District Court decisions which are distinguishable from this

case on their facts. The first of these involved persons in the middle of a chain of distribution and remote consumers, compounded by failure to make discovery, *Philadelphia Housing Authority v. American Radiator and Standard San. Corp.*, 323 F.Supp. 364 (E.D. Pa. 1970). The second of these involved cost plus contracts, the recognized exception under *Hanover Shoe, National Auto Brokers Corp. v. General Motors Corp.*, 376 F.Supp. 620 (S.D.N.Y. 1974).

CONCLUSION

It is respectfully submitted that the judgment of the court below is in accord with the decision of this Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and raises no new issues which would call for a Writ of Certiorari.

Respectfully submitted,

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